

ST 96-10

Tax Type: SALES TAX

Issue: Immediate Consumption on Foods (High or Low Rate)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

versus

TAXPAYER
Taxpayer

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Docket #
IBT #
NTL #

RECOMMENDATION FOR DISPOSITION

APPEARANCES: ATTORNEY FOR TAXPAYER

SYNOPSIS:

THE ILLINOIS DEPARTMENT OF REVENUE (THE "DEPARTMENT") ISSUED A NOTICE OF TAX LIABILITY ON JUNE 24, 1992 TO THE TAXPAYER IN THE AMOUNT OF \$12,401.00. THE TAXPAYER PAID UNDER PROTEST A PORTION OF THE LIABILITY. HE ALSO PROTESTED THE NOTICE AND REQUESTED A HEARING. THE HEARING WAS HELD PURSUANT TO THE REQUEST. AT THE HEARING, THE TAXPAYER SHOWED THAT THE 80-20 RATIO ESTABLISHED IN CANTEEN FOR FOOD DISPENSED IN VENDING MACHINES THAT IS NOT ACTUALLY PREPARED BY THE VENDOR AND IS SOLD IN AREAS WITH ON-SITE CONSUMPTION FACILITIES WAS THE APPROPRIATE RATIO TO APPLY TO THE AMOUNT OF PURCHASES AT ISSUE IN THIS MATTER. IT IS THEREFORE RECOMMENDED THAT THE DECISION OF THE DIRECTOR OF THE DEPARTMENT BE THAT THE TAXPAYER WAS LIABLE FOR A PORTION OF THE TAX IMPOSED BY THE NOTICE OF TAX LIABILITY.

FINDINGS OF FACT:

1. THE DEPARTMENT'S PRIMA FACIE CASE WAS ESTABLISHED BY THE ADMISSION INTO EVIDENCE OF DEPT. EX. NOS. 1 THROUGH 5.

2. THE TAXPAYER IS AN INDEPENDENT DISTRIBUTOR FOR COMPANY IN DECATUR, MACON, DOUGLAS, PIATT AND SANGAMON COUNTIES. TR. PP 10-12

3. THE TAXPAYER HAS APPROXIMATELY 35 ACCOUNTS IN APPROXIMATELY THE SAME NUMBER OF LOCATIONS. TR. P. 11

4. THE TAXPAYER WAS PAYING A ONE PERCENT TAX ON ALL SALES FROM HIS VENDING MACHINES PRIOR TO THE AUDIT DONE BY THE DEPARTMENT. TR. PP. 12-13

5. AT THE COMPLETION OF THE AUDIT, THE TAXPAYER PAID A DEFICIENCY OF \$5,089.00 FOR THE TAX ASSESSMENTS HE ACKNOWLEDGED THAT HE OWED AT THE HIGHER RATE OF TAX. TR. 14

6. THE TAXPAYER MADE THE \$5,089.00 PAYMENT UNDER PROTEST. DEPT. EX. NO. 3

7. THE TAXPAYER CURRENTLY HAS 50 MACHINES IN 35 DIFFERENT LOCATIONS. TR. P. 37

8. OF THOSE, THE TAXPAYER HAS ELEVEN MACHINES LOCATED IN NINE AREAS WITH ON-PREMISES CONSUMPTION FACILITIES. TR. 15

9. THE AREAS WITH ON-PREMISES CONSUMPTION FACILITIES IN 1995 ARE NOT THE SAME LOCATIONS THAT WERE THE SUBJECT PREMISES OF THE AUDIT. TR. PP. 15-16

10. PRIOR TO THE HEARING, THE TAXPAYER AND EMPLOYEES OF THE AREAS WHERE HE HAD VENDING MACHINES INSTALLED TABULATED THE CONSUMPTION OF FOODS AT ALL OF HIS CURRENT LOCATIONS WITH ON-PREMISES CONSUMPTION FACILITIES. TR. PP. 16-35; TAXPAYER'S EX. NOS. 1-3, TAXPAYER'S EX. A-E

11. THE TOTAL NUMBER OF PURCHASES FROM THE VENDING MACHINES THAT WERE CONSUMED AT THE ON-PREMISES CONSUMPTION FACILITIES IN 1995 WAS 20 PER-CENT. TR. PP. 20; TAXPAYER EX. A-E

12. THE AVERAGE DAILY SALES IN 1995 WERE COMPARABLE TO THE AVERAGE DAILY SALES IN 1990. TR. PP. 30-34, 39-45, 49; TAXPAYER EX. NOS. 2,3; TAXPAYER EX. D,E

CONCLUSIONS OF LAW:

THE RETAILERS' OCCUPATION TAX ACT IMPOSES A TAX ON RETAILERS IN THE STATE OF ILLINOIS PURSUANT TO 35 ILCS 120/2:

2. TAX IMPOSED. A TAX IS IMPOSED UPON PERSONS ENGAGED IN THE BUSINESS OF SELLING AT RETAIL PERSONAL PROPERTY...

IN FURTHERANCE OF THE STATUTORY PROVISION, THE DEPARTMENT HAS PROMULGATED CERTAIN RULES AND REGULATIONS GOVERNING THE TRANSACTIONS AT ISSUE. THE RULE AT §6 ILL. ADMIN CODE, CH. I, SEC 130.310 PROVIDES:

A.) GENERAL. WITH RESPECT TO FOOD FOR HUMAN CONSUMPTION WHICH IS TO BE CONSUMED OFF THE PREMISES WHERE IT IS SOLD (OTHER THAN ALCOHOLIC BEVERAGES, SOFT DRINKS, AND FOOD WHICH HAS BEEN PREPARED FOR IMMEDIATE CONSUMPTION), AND ... , THE TAX IS IMPOSED AT THE RATE OF 1%.

B) FOOD

1) A FOOD IS ANY SOLID, LIQUID, POWDER OR ITEM INTENDED BY THE SELLER PRIMARILY FOR INTERNAL CONSUMPTION...

2) GROSS RECEIPTS FROM SALES OF FOOD FOR WHICH FACILITIES ARE PROVIDED SO THAT IT CAN BE CONSUMED ON THE PREMISES WHERE IT IS SOLD AND GROSS RECEIPTS FROM SALES OF FOOD WHICH HAS BEEN PREPARED FOR IMMEDIATE CONSUMPTION DO NOT QUALIFY FOR THE REDUCED RATE. FOR EXAMPLE:...

6) FOOD PREPARED FOR IMMEDIATE CONSUMPTION MEANS FOOD MADE READY BY THE RETAILER TO BE

EATEN WITHOUT SUBSTANTIAL DELAY AFTER THE FINAL STAGE OF PREPARATION BY THE RETAILER. RETAILERS WHO SELL FOOD WHICH THEY DO NOT PREPARE IN ANY WAY, ARE NOT SELLING FOOD FOR IMMEDIATE CONSUMPTION, I.E., PRE-PACKAGED CANDY BARS, SNACKS, CHIPS, ICE CREAM, UNLESS THAT FOOD IS TO BE CONSUMED ON THE RETAILER'S PREMISES. IT IS PRESUMED THAT RETAILERS WHO SELL FOOD PREPARED FOR IMMEDIATE CONSUMPTION IN INDIVIDUAL SINGLE-SIZED SERVINGS WILL SELL ALL SUCH ITEMS FOR CONSUMPTION WITHOUT SUBSTANTIVE DELAY. THUS, FOR EXAMPLE, A RETAILER OF INDIVIDUAL SANDWICHES, DOUGHNUTS OR COOKIES PREPARED IN THE MORNING WILL BE SUBJECT TO THE HIGH RATE OF TAX REGARDLESS OF WHEN DURING A BUSINESS DAY SUCH ITEMS ARE SOLD AND ACTUALLY CONSUMED. "PREMISES" ARE THAT AREA OVER WHICH THE VENDOR EXERCISES CONTROL, WHETHER BY LEASE, CONTRACT, LICENSE OR OTHERWISE, AND, IN ADDITION, THE AREA IN WHICH FACILITIES FOR EATING ARE PROVIDED, INCLUDING AREAS DESIGNATED FOR, OR DEVOTED TO, USE IN CONJUNCTION WITH THE BUSINESS ENGAGED IN BY THE VENDOR. THUS, ALL FOOD SOLD BY A RESTAURANT FOR CONSUMPTION ON PREMISES, WHETHER PREPARED FOR IMMEDIATE CONSUMPTION OR NOT, IS SUBJECT TO THE HIGH RATE. CANDY BARS SOLD THROUGH A VENDING MACHINE LOCATED OUTSIDE A SERVICE STATION WITH NO FACILITIES FOR CONSUMPTION, WOULD BE SUBJECT TO THE LOW RATE OF TAX, WHILE AN IDENTICAL CANDY BAR SOLD THROUGH AN IDENTICAL VENDING MACHINE IN A CAFETERIA, BREAK AREA, OR A LOCATION WITH SHARED EATING FACILITIES WOULD BE SUBJECT TO THE HIGH RATE. VENDOR PREMISES WOULD INCLUDE EATING AREAS PROVIDED BY EMPLOYERS FOR EMPLOYEES, COMMON OR SHARED EATING AREAS IN SHOPPING CENTERS OR PUBLIC BUILDINGS IF CUSTOMERS OF FOOD VENDORS ADJACENT TO SUCH AREAS ARE PERMITTED TO USE THEM FOR CONSUMPTION OF FOOD PRODUCTS. IT WILL BE PRESUMED THAT FOOD SOLD BY VENDORS WITH ON-PREMISES CONSUMPTION FACILITIES WILL, IN FACT, BE CONSUMED ON PREMISES UNLESS THE VENDOR PRESENTS EVIDENCE TO THE CONTRARY FROM ITS BOOKS AND RECORDS.

THE ISSUE IN THIS CASE IS SIMILAR TO ONE PRESENTED TO THE ILLINOIS SUPREME COURT IN CANTEEN CORP. V. DEPARTMENT OF REVENUE, 123 ILL.2D 95 (1988). WHILE CANTEEN HAD TO DO WITH A CLAIM FOR CREDIT RATHER THAN THE NOTICE OF TAX LIABILITY SITUATION WE HAVE HERE, IT IS INSTRUCTIVE TO LOOK AT THE COURT'S ANALYSIS OF THE TERMS PREPARATION, IMMEDIATE AND CONSUMPTION AS WELL AS THEIR EXAMINATION OF THE STATUTE AT ISSUE. IN THE ANALYSIS, THE

COURT FOUND THAT CANTEEN HAD MET THEIR BURDEN OF PROOF AS TO A PROPORTIONATE RATE FOR THE PREPARED AND PREPACKAGED ITEMS, SPECIFICALLY, CANDY, PRETZELS, CHIPS AND OTHER SNACKS, MILK, JUICE, PASTRIES AND CANNED BEVERAGES AND FOUND THAT THOSE SALES WERE NOT SALES OF FOOD FOR IMMEDIATE CONSUMPTION.

THE COURT FOUND THAT THE HOT FOODS SOLD BY CANTEEN DID NOT REACH THE FINAL STAGE OF PREPARATION UNTIL MIXED AND HEATED AT THE TIME OF SALE AND THEREFORE WERE FOODS PREPARED FOR IMMEDIATE CONSUMPTION. THE COURT ALSO FOUND THAT CANTEEN DID NOT MEET ITS BURDEN OF PROOF REGARDING THE GENERAL FOOD ITEMS HAVING BEEN PREPARED FOR IMMEDIATE CONSUMPTION. THE COURT THEN ANALYZED THE TERM PREMISES. IT FOUND THE TERM TO BE THE DEFINITION THAT THE DEPARTMENT INCORPORATED INTO 86 ILL. ADMIN CODE, CH. I, SEC 130.310.

THE TAXPAYER AND THE EXPERT WITNESS IN CANTEEN DEMONSTRATED TO THE COURT THAT A PERCENTAGE OF THE FOOD THAT WAS SOLD FROM ITS VENDING MACHINES AND NOT PREPARED FOR IMMEDIATE CONSUMPTION, BUT WAS SOLD IN AREAS WITH ON-PREMISES CONSUMPTION FACILITIES, WAS IN FACT CONSUMED OFF THE PREMISES. THE COURT FOUND THAT THE TAXPAYER PROVED THAT HE WAS ENTITLED TO A CREDIT FOR THE APPROPRIATE PERCENTAGE OF THE TAX PAID AT THE HIGH RATE ON THE SALES OF FOOD NOT PREPARED FOR IMMEDIATE CONSUMPTION BUT SOLD AT LOCATIONS WHERE THE TAXPAYER OFFERED ON-PREMISES EATING FACILITIES. THE TAXPAYER ESTABLISHED THAT 80% OF THE FOOD SOLD AT THOSE LOCATIONS WERE EATEN OFF THE PREMISES, EVEN THOUGH THERE WERE EATING FACILITIES AT THE LOCATIONS WHERE THE FOOD WAS SOLD.

AS IN CANTEEN, I FIND THAT THE TAXPAYER IN THIS CASE HAS MET HIS BURDEN OF PROOF. THE RULE IS SPECIFIC WHEREIN IT STATES THAT IT WILL BE PRESUMED THAT FOOD SOLD BY VENDORS WITH ON-PREMISES CONSUMPTION FACILITIES WILL BE CONSUMED ON THE PREMISES, AND THEREFORE TAXED AT THE

HIGH RATE UNLESS THE VENDOR PRESENTS EVIDENCE TO THE CONTRARY FROM ITS BOOKS AND RECORDS.

IN THIS CASE, THE TAXPAYER HAS ESTABLISHED BY RECORDS AND EXHIBITS THAT OVER 79% OF THE FOOD THAT WAS SOLD AT ON-PREMISES SITES WAS IN FACT CONSUMED OFF THOSE PREMISES. I FIND THAT IT IS ESTABLISHED THAT EVEN THOUGH THE FOOD WAS PRESUMED TO BE PURCHASED FOR IMMEDIATE CONSUMPTION, THE TAXPAYER IS ENTITLED TO A LOWER RATE OF TAX IMPOSITION PROPORTIONATE TO THE PERCENTAGE OF FOOD THAT HE HAS SHOWN WAS CONSUMED OFF THE PREMISES WHERE SOLD. I FIND THAT THE TESTIMONY AND EXHIBITS OF THE TAXPAYER AND THE EMPLOYEES OF THE AREAS SERVICED IS CREDIBLE EVEN IF SELF-SERVING ON THE PART OF THE TAXPAYER.

I THEREFORE RECOMMEND THAT THE DIRECTOR OF THE DEPARTMENT ACCEPT THE PAYMENT OF \$5,089.00 THAT THE TAXPAYER PAID PURSUANT TO THE NOTICE OF TAX LIABILITY WITH HIS ACKNOWLEDGMENT THAT THE AMOUNT WAS DUE FOR ITEMS THAT SHOULD HAVE BEEN TAXED AT THE HIGH RATE. I ALSO RECOMMEND THAT OF THE REMAINING AMOUNT SHOWN ON THE NOTICE OF TAX LIABILITY, 80% BE FOUND TO BE TAXABLE AT THE LOW RATE OF TAX AND 20% BE FOUND TO BE TAXABLE AT THE HIGH RATE OF TAX.

RESPECTFULLY SUBMITTED,

BARBARA S. ROWE
ADMINISTRATIVE LAW JUDGE

FEBRUARY 9, 1996